Niles Company, Inc. *and* Henry Thomas. Case 1–CA–33991

May 13, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 18, 1997, Administrative Law Judge Thomas R. Wilks issued the attached Decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth below.[2]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by the following conduct:

(a) Promulgating, maintaining, and enforcing a policy which prohibited its employees from discussing salary and payroll issues with other employees.

(b) Revoking a pay raise previously promised to employee Jeffrey Cuatto because he engaged in the protected concerted activity of discussing salaries with other employees of the Respondent.

(c) Reprimanding and threatening employees that violation of the policy prohibiting discussion of salary and payroll issues would result in termination.

3. The foregoing unfair labor practices affect commerce within the meaning of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Niles Company, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth below.

1. Cease and desist from

(a) Promulgating a rule prohibiting employees from discussing their salaries and payroll issues with each other.

(b) Unlawfully revoking employee pay raises, reprimanding them, or threatening them with discharge if they discuss salary and payroll issues with other employees.

(c) In any like or related matter interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any references to the December 7, 1995 reprimand issued to Jeffrey Cuatto for violating its unlawful rule prohibiting concerted employee discussion of salary and payroll issues; and within 3 days thereafter notify Cuatto in writing that this has been done and that such prior punishment will not be used against him in any way.[3]

(b) Within 14 days after service by the Region, post at its Windsor Place Condominiums complex in Boston, Massachusetts, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[1] We have modified the judge's Conclusions of Law and Order to conform with the violations found. We have added a cease–and–desist provision regarding the promulgation of the policy which prohibited employees from discussing salary and payroll issues with other employees, as such a provision was inadvertently omitted by the judge.

We agree with the judge's determination that the record does not support an award of backpay to employee Henry Thomas. Neither Thomas' testimony concerning his conversation with the Respondent's Property Administrator Laura Lee, Lee's followup letter to Thomas, nor Lee's sworn affidavit concerning the matter establishes that the Respondent had unequivocally decided to raise Thomas' pay in order to ensure that he would be paid at a higher hourly rate than Jeffrey Cuatto. Absent such evidence, we find no basis for awarding Thomas backpay on the theory that he was subsequently denied that raise as a consequence of the Respondent's unlawful conduct vis-a-vis Cuatto.

[2] We have modified the judge's recommended Order to reflect the time limitations for compliance as set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] To the extent that the December 7, 1995 reprimand given to employee Cuatto has already been expunged from the Respondent's files, this remedial provision is rendered moot.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate a rule which prohibits employees from discussing salary and payroll issues with each other.

WE WILL NOT unlawfully revoke employee pay raises, reprimand them, or threaten them with discharge if they discuss salaries and payroll issues with other employees.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the December 7, 1995 reprimand issued to Jeffrey Cuatto for violation of our unlawful November 1995 rule prohibiting concerted employee discussion of salary and payroll issues, which we have since rescinded, and for which unlawful enforcement of that rule we have made Jeffrey Cuatto whole for any loss of pay by him and have since apologized to him in writing; and, We Will within 3 days thereafter notify Cuatto in writing that this has been done and that such punishment will not be used against him in any way.

NILES COMPANY, INC.

Don Firenze, Esq., for the General Counsel.
James L. Sheehan, of Boston, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The original unfair labor practice charge was filed on April 11, 1996, by Henry Thomas, an individual, against Niles Company, Inc. (the Respondent). It was amended on May 10, 1996. Thereafter, on May 23, 1996, the Acting Regional Director issued a complaint against the Respondent. That complaint alleged as follows:

> 7. About November 1, 1995, Respondent, by memorandum to employees, promulgated and since then has maintained the following rule:
>
> Employee salaries and payroll issues are confidential and should not be discussed between staff members. If you have a question regarding your salary or weekly pay check, you should either speak to [Laura Lee, Property Administrator] or Jim Sheehan [Property Manager]—Discussing these issues with anyone else is inappropriate.
>
> 8. About December 4, 1995, the Respondent, by Laura Lee, promised Henry Thomas a $0.25 per hour raise on the condition that he observe the rule set forth in paragraph 7, above.
>
> 9. About December 7, 1995, Respondent, by memo,
>
> a) revoked the pay raise to Thomas described in paragraph 8, above;
>
> b) revoked a pay raise previously promised to its employee Jeff Cuatto; and
>
> c) threatened employees that violation of the rule set forth in paragraph 7, above would result in termination.
>
> 10. Respondent engaged in the conduct described above in paragraphs 9(a) and 9(b) because Thomas and Cuatto violated the rule set forth above in paragraph 7, and to discourage employees from engaging in these or other protected, concerted activities.
>
> 11. By the conduct described above in paragraphs 7 through 10, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

The Respondent filed an answer on May 31, 1996, which admitted the jurisdiction and agency allegations. The Respondent also admitted paragraph 7, admitted that it was in violation of employee rights but asserted that the rule was rescinded by memoranda notices to employees from Lee dated April 17, 1996, as follows:

> In a memorandum dated November 1, 1995, I advised you that employee salaries are confidential and not to be discussed with other employees.
>
> It has recently come to my attention that it is within your rights to discuss salary issues with other employees. Please disregard the above mentioned memorandum instructing you not to discuss salaries.
>
> I stand corrected and apologize for any inconvenience caused by my error.

With respect to Cuatto, Respondent admitted the following:

> On December 7, 1995, Jeffrey Cuatto's pay raise was revoked and he was reprimanded [for violation of the above rule]. On April 17, 1996, Laura Lee sent a memorandum to Mr. Cuatto which apologized for her error and increased his salary $.25/hour retroactive to January 1, 1996. The warning issued December 7 was stricken from his file, making Mr. Cuatto whole.

The remaining issues were those concerning the December 7 rescission of a promised pay raise of 25 cents per hour to Thomas, or at least the promise to consider granting him such pay raise, in addition to a recently granted performance review raise of 25 cents per hour. It is undisputed that Thomas and Cuatto had discussed their identical wage rates and performance review raises for 1996. Lee had become aware of such discussion when so informed by Thomas by letter of December 3 and in a telephone conversation with Lee on December 4. The promise to Thomas occurred during that conversation allegedly, according to the General Counsel, to satisfy Thomas' complaint that he ought to be paid more than Cuatto.

The Respondent argues that it did not discriminatorily rescind a promise to give or to consider an additional pay raise to Thomas, which promise was made to him after violation of the unlawful rule because of that very violation. The Respondent cogently argued that had it maintained any animus toward Thomas because of the violation of the unlawful rule, it never would have promised him an additional raise in the first place.

The trial of this issue was held before me at Boston, Massachusetts, on December 3, 1996. Opportunity was given for the

parties to introduce relevant testimony and documentary evidence. Because of illness, Lee did not comply with the General Counsel's subpoena to appear and testify. The Respondent did not serve a subpoena upon her but relied upon the General Counsel to produce her. Because there was no immediate foreseeability of her recovery to enable her to testify, the parties stipulated into evidence as a respondent exhibit her pretrial affidavit in lieu of testimony for the Respondent. The General Counsel rested without her testimony. The parties argued orally.

After the hearing on December 13, 1996, the General Counsel filed a motion to withdraw complaint paragraph 9(a) regarding the alleged revocation of Thomas' promised pay raise but reaffirmed its oral argument that Thomas was denied an additional pay raise as a consequence of the unlawful denial of a pay raise to Cuatto. The motion is granted and received as General Counsel's Exhibit 1-J. The General Counsel argues that when the Respondent reinstated the Cuatto pay raise, it ought to have also reinstated the promised additional pay raise to Thomas in order to properly effectuate a full and complete status quo ante remedy. Thus, the issue is not one of alleged discrimination but rather that of appropriate remedy with respect to Thomas. According to the General Counsel, the Respondent had committed itself to maintain a disparity of pay between Thomas and Cuatto, to the advantage of Thomas of 25 cents per hour.

It should be noted that the transcript and exhibits in this case were not received in the office of the Division of Judges until February 5, 1997, because of an apparent misdirection in the agency in-house delivery system.

On the entire record in this case, including my evaluation of the demeanor of witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a corporation, with a place of business in Boston, Massachusetts (the Respondent's Boston offices), has been engaged in the management and rental of residential housing, including a complex known as Windsor Place Condominiums. Annually, the Respondent, in conducting these business operations, derives gross revenues in excess of $500,000 and purchases and receives at its Boston offices goods valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts, and from other enterprises within the Commonwealth of Massachusetts which received the goods directly from points outside the Commonwealth of Massachusetts.

It is admitted, and I find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Facts

In November, Manager Lee met with employees of the Windsor Place Condominiums complex to discuss their performance reviews.[1] One of the employees was Thomas who is also a full-time student. His duties for the Respondent were that of a front-desk concierge in the lobby of the condominium. Thomas was given a 25-cent–per hour raise at this November 1995 review; effective as of January 1, 1996, which raised his pay to $9.75 per hour. He was told that this was in consequence of his satisfactory work performance. Several days later, he and coworker Cuatto discussed their equal wages, including equal performance review raises. Thomas was perturbed because Cuatto, his friend, had less seniority.

On about December 3, 1995, Thomas served a letter upon Lee wherein he complained about the equality of pay with Cuatto and, in so doing, disclosed their concerted conversation. The next morning, Lee telephoned Thomas. He reiterated his complaint. According to Thomas' testimony, Lee said that "one of the reasons" for the equality of pay was that a different budget was in place at the time of Cuatto's hiring. Lee's affidavit, not explicitly contradicted by Thomas, indicates that she also pointed out that Thomas received more benefits than Cuatto and that Cuatto had greater work experience.

According to Thomas, Lee promised him a 25-cent hourly raise on condition he not tell other employees of it. He agreed and departed and complied. Lee's affidavit states: "I told Mr. Thomas that I would consider his request for an additional hourly wage increase . . . I believe that the figure of 25 cents per hour may have been mentioned." Her affidavit is silent as to the nondiscussion request but does not preclude it, as she admittedly authored a December 7, 1995 memorandum to Cuatto rescinding his raise because he had violated the preexisting restriction upon concerted employee pay discussions, which Respondent now admitted was unlawful. On the same date, she advised Thomas by separate memorandum that in response to his December 3 letter and their conversation of December 4, she had decided to keep his raise limited to the 25-cent level he had been granted and no more as fair enough compensation for his level of performance. In the first paragraph, she prefaced that condition with the comment that she did not make a practice of comparing salaries but rather made adjustments upon individual reviews.[2]

It is the fourth paragraph of Lee's December 7 letter upon which the General Counsel's remedial theory is premised. That paragraph stated:

> Although it is inappropriate to disclose another employees [sic] salary, I have thought about your position and made adjustments so that your salary reflects your contributions and loyalty over the past year and a half in contrast to the salaries of other Concierge Staff members who have not been here as long or contributed as much.

The General Counsel argues that based upon that paragraph as evidence, Respondent committed itself to a disparity of pay between Thomas and Cuatto to the 25-cent hourly advantage of Thomas. The General Counsel's position is that the "adjustments" made by Lee to accomplish that disparity was the unlawful revocation of Cuatto's pay raise.

The final paragraph of Lee's December 7 memorandum ordered him to "under no circumstances" engage in concerted discussions of pay with other employees. Neither in that letter nor in the November pay performance review memorandum, which referenced the concerted employee pay discussion, did Lee explicitly set forth what sanction would be imposed for violation of the policy. However, in the December 7 memo-

[1] The November 1, 1995 memoranda to employees from Lee notified them of the impending reviews and contained the restriction upon mutual employee pay discussions.

[2] Sheehan testified that Respondent's pay policies are not predicated on seniority nor parity of pay per seniority. He testified that the consideration for an additional 25 cents for Thomas was motivated by courtesy and not fairness of treatment.

randum to Cuatto, she threatened him with termination if he violated the rule again.

Analysis

The Respondent admits that the restrictive policy which prohibited employee mutual discourse of their compensation was an unlawful interference with employee concerted protected authority. Indeed it was. See, for example, *Automotive Screw Products,* 306 NLRB 1072 (1992); *Triana Industries*, 245 NLRB 1258 (1979); and *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995). Accordingly, I find that the Respondent violated Section 8(a)(1) by revoking Cuatto's pay raise because he concertedly discussed pay compensation with Thomas, and by threatening Cuatto with discharge for any future similar concerted activity as alleged in the complaint.

With respect to the remedial order, the General Counsel argues that it should extend to Thomas a restoration of the status quo ante, i.e., a 25-cent hourly pay disparity to his advantage. The General Counsel concedes that the revocation of his promised second 25-cent raise was not discriminatorily motivated. He argues, however, that by the fourth paragraph of the December 7 letter, Respondent committed itself to an advantageous pay disparity to Thomas and accomplished it by the unlawful revocation of Cuatto's raise. Thus, he argues, had it not been for the unfair labor practice against Cuatto, Thomas would have received the additional raise.

I conclude that the General Counsel's conclusion is based upon speculation. The evidence is insufficient for me to conclude that Thomas would have necessarily received the promised additional raise had Cuatto's raise not been revoked. The December memorandum first advised Thomas that the Respondent had decided that he had reached his maximum worth in pay and benefits and was not entitled to the additional raise. As a sop, Thomas was told he achieved the disparity of pay between himself and Cuatto by way of the unlawful "adjustment." There is nothing in that memorandum, read as a whole, upon which I am able to conclude that Respondent made an irrevocable commitment to the 25-cent disparity in pay between the two employees. Rather, it can equally be concluded that Respondent decided that it was agreeable to a disparity but only if it did not result in any additional raise to Thomas.

The memorandum did not advise Thomas that he was not receiving an additional 25-cent raise because Cuatto's raise had been rescinded, and thus disparity had been achieved. Rather, the letter advised him that the Respondent would not grant him an additional raise because it believed Thomas had reached the maximum pay warranted for his level of performance.

The Respondent may have decided to punish Cuatto solely because of his concerted protected activity and utilized the revocation as a punishment. Indeed, that is the theory of the complaint. Had the Respondent revoked Cuatto's raise pursuant solely to the commitment to disparity, then it would not have acted unlawfully. However, I conclude that its prime motive was unlawful punishment of Cuatto.

Lee, the December 7 memorandum author, suggested to Thomas in paragraph 4 that the "adjustments," i.e., Cuatto's pay revocation, were made for the purpose of achieving pay disparity. The proofs demonstrate that the motivation was not pay disparity, but unlawful punishment.

Absent any other testimonial evidence, I cannot conclude that the General Counsel has adduced sufficient evidence upon which to conclude that the Respondent had irrevocably committed itself to a pay disparity between Thomas and Cuatto. I conclude that paragraph 4 described purpose of the adjustments can equally be interpreted, in the context of the record in this case, to constitute nothing more than a disingenuous afterthought sop to Thomas. Absent evidence and even an allegation of discriminatory abandonment of the alleged commitment to a 25-cent pay disparity advantage to Thomas or a promised second raise, I cannot conclude that the remedial order should extend to him because I cannot find that he would have necessarily received the promised additional raise had it not been for the unlawful revocation of Cuatto's raise.

CONCLUSIONS OF LAW

1. As found above, the Respondent is an employer engaged in commerce within he meaning of Section 2(6) and (7) of the Act.

2. As found above, the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint as amended.

3. The foregoing unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Inasmuch as it has been stipulated that as of April 17, 1996, the Respondent has rescinded the revocation of Jeff Cuatto's January 1, 1996 pay raise and has made him whole retroactively from that date to January 1, 1996, I find a backpay order unnecessary, and I conclude that any interest due would be too minimal to warrant compliance policing time and expense.

Inasmuch as the Respondent has formally, by memorandum sent to each employee, apologetically rescinded its unlawful November 1995 no-concerted employee pay discussion memorandum, I find it unnecessary to order it to rescind that unlawful memorandum.

However, because a significant interference with employee Section 7 rights were involved, I find that a formal notice posting under Board auspices is warranted.

[Recommended Order omitted from publication.]